STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CHESTERFIELD TOWNSHIP,
Public Employer-Respondent,

Case No. C09 C-036

-and-

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Seibert and Dloski, P.C., by Robert J. Seibert, Esq., for the Respondent

Brendan J. Canfield, Esq., Attorney for Police Officers Labor Council, for the Charging Party

DECISION AND ORDER

On March 17, 2010, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts as its order the order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

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APPEARANCES:

Seibert and Dloski, P.C., by Robert J. Seibert, Esq., for the Respondent

Brendan J. Canfield, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On March 16, 2009, the Police Officers Labor Council filed the above charge with the Michigan Employment Relations Commission (the Commission) against Chesterfield Township. The charge alleges that Respondent violated Section 10(1) (a) of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 by interfering with the rights of Charging Party member Earl Riske to union representation at an investigatory interview conducted on February 9, 2009. Pursuant to Section 16 of PERA, the case was assigned for hearing to Julia C. Stern, Administrative Law Judge for the State Office of Administrative Hearings and Rules. On July 16, 2009, the parties submitted a stipulation of facts, supplemented by exhibits, in lieu of a hearing. The stipulated exhibits included separate audio and video recordings of the February 9, 2009 interview. Based upon the entire record, including the stipulated facts and exhibits and briefs filed by both parties on or before August 4, 2009, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

The charge reads as follows:

> On February 9, 2009, the Employer conducted an investigatory interview with Sergeant Earl Riske; the interview subsequently led to Sergeant Riske's termination. During that interview, the Employer unlawfully denied Sergeant Riske his Weingarten rights by ordering his Union Steward, Sergeant Ken Franks, not to

participate. The Employer specifically informed Sergeant Franks that he could only act as a "witness" at the interview, forbade him from intervening on any questions, and refused Sergeant Riske the opportunity to confer with Sergeant Franks.

Findings of Fact:

The findings of fact below are based on the stipulations of the parties and on statements made by the participants at the February 9, 2009 interview as recorded on the audio recording.

Charging Party is the exclusive bargaining representative for a unit of sergeants and lieutenants employed in Respondent's police department. On January 8, 2008, Respondent issued Sergeant Earl Riske a ten day suspension because of his role in the arrest and charging of a suspect. Charging Party filed a grievance over the suspension, and an arbitration hearing on the grievance was held on December 2, 2008. Riske testified in his defense at the hearing. Respondent believed that there were inconsistencies between Riske's testimony at the arbitration hearing and his answers to questions put to him by Police Chief Bruce Smith before he was suspended. In addition, at the arbitration hearing Riske testified regarding conversations he had with two other police officers and with the suspect on the day of the arrest. Respondent believed that Riske's testimony conflicted with statements made by the two officers and the suspect. Respondent initiated an investigation into whether Riske had deliberately misrepresented the facts surrounding the incident.

On February 9, 2009, Police Chief Smith and Lieutenant Charles Verschaeve conducted an interview of Riske as part of the above investigation. Sergeant Ken Franks, Charging Party's steward, attended the interview as Riske's union representative. The record does not indicate what exactly Riske and/or Franks were told about the purpose of the interview or the charges against Riske before the interview began. However, Charging Party does not assert that Riske was denied the opportunity to consult with Franks before, as opposed to during, the interview.

At the beginning of the interview, Verschaeve, Smith and Franks had the following exchange:

> Verschaeve: I want to start out by saying, Ken . . . your position here is a union rep. You're strictly here as a witness. You're not to intervene on any of the questions. Do you understand that?
>
> Franks: Yes. Can he confer with me?
>
> Smith: You're here to be a witness.

Franks did not say anything during the remainder of the interview, which lasted thirty-eight minutes. I have not attempted to summarize the entire interview, but have included some statements which provide a general idea of its character. At the beginning of the interview, Verschaeve told Riske that he was giving him a direct order to answer all questions completely and truthfully, and asked Riske if he remembered that he had been given the same order at his interview with Smith before the suspension. Riske was also asked if he believed that an officer should be truthful and answer all questions truthfully during an investigation, and if he had answered truthfully and

completely at his interview with Smith. Riske said he had answered truthfully but hadn't been allowed to answer completely. When Smith asked him to explain this statement, Riske responded that he was cut off, badgered and harassed during that interview. Verschaeve then asked if the reason Riske didn't answer completely was that Smith didn't allow him to answer. Riske replied that if he hadn't answered any question completely, it was because Smith had cut him off. Later in the interview, the questioning turned again to what Riske had told Smith at this interview, and Riske again maintained that he had not been given the opportunity to tell the whole story. At one point, Smith said to Riske, "So it was my fault that you didn't get the chance to tell me the truth?"

Riske was questioned extensively about his testimony at the arbitration hearing. For example, Riske was asked about his statement that he had called the suspect's cell phone on the day of the incident and left a message. Riske said that he did not remember how he had obtained the number, but that his call had been made from a department phone and should have been recorded. Verschaeve did not respond to Riske's comment that the call should have been recorded, but stated that Respondent had the suspect's phone records and that there was no call on that morning. Verschaeve also questioned Riske in detail about conversations Riske claimed to have had with the suspect and with other police officers, telling him that the other participants had claimed the conversations did not occur or had different versions of what was said. Riske repeatedly said that he did not think the others were lying, but that they either couldn't remember after the passage of time or had misunderstood. Riske said several times that the conversations being discussed had taken place in areas of the police station where they should have been recorded, but Verschaeve did not respond to these statements

At one point in the interview, Riske was asked if he had any comment about the fact that the arbitrator had credited one of the other officer's testimony over his. Riske said that he had not read the arbitrator's award. Verschaeve also asked Riske about a statement made in Charging Party's brief to the arbitrator. Riske admitted that this was not an accurate statement, but said that he had not seen the brief.

At the end of the interview, Verschaeve said to Riske, "In your opinion, what should happen to an employee who is found to be lying in an investigation or lying under oath?" Riske said that he didn't know, that it depended on the totality of the circumstances. Riske was then asked if he there was anything else he wanted to tell Verschaeve and Smith. Riske said that he felt that they were on a witch hunt and were asking people about things that had happened two years earlier.

The parties stipulated to the following additional facts: Sergeant Riske was discharged from his employment with the Chesterfield Township Police Department effective March 3, 2009. The Township used information obtained during the February 9, 2009 investigatory interview, as well as other information obtained during an internal investigation, in its decision to discharge Sergeant Riske. Sergeant's Riske's exercise of his *Weingarten* rights did not contribute to his discharge.

Discussion and Conclusions of Law:

In *NLRB v Weingarten, Inc*., 420 US 251 (1975), the Supreme Court affirmed the National Labor Relations Board's (NLRB or the Board) holding that an employer violates the rights of an

individual employee under the National Labor Relations (NLRA), 29 USC 150 et. seq., by refusing that employee's request for union representation at an investigatory interview which the employee reasonably believed might result in discipline. The Supreme Court, at 259-260, quoted with approval from the NLRB's brief, "The representative is present to *assist* the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." [Emphasis added] In *University of Michigan,* 1977 MERC Lab Op 496, the Commission announced that it would apply the so-called *Weingarten* rule to PERA.

The NLRB has consistently held that an employer cannot lawfully require the union representative to remain silent throughout the investigatory interview, since by doing so the employer denies the employee's right to the *assistance* of a union representative and reduces it to the mere *presence* of a representative. *Southwestern Bell Telephone Co,* 51 NLRB 612, 612 (1980); *Texaco, Inc,* 252 NLRB 633, enf'd *NLRB v Texaco, Inc* 659 F2d 124 (CA 9, 1981); *New Jersey Bell Telephone Co,* 308 NLRB 277, 278, (1992)("the permissible extent of participation of *Weingarten* representatives in interviews lies somewhere between mandatory silence and adversarial confrontation."); *In re Barnard College,* 340 NLRB 934 (2003);*Southern Mail, Inc,* 345 NLRB 644 (2005); *United States Postal Service,* 351 NLRB 1226 (2007).

In *River Valley Sch Dist,* 1980 MERC Lab Op 1107 (no exceptions) a Commission administrative law judge held, consistent with the decisions above, that the employer violated employees' rights to a union representative at their investigatory interview when it told the union representative at the beginning of this interview that he was to be a silent witness. The administrative law judge noted in that case that *Weingarten* contemplates more than the presence of another body in the room during an investigatory interview.

Respondent relies on *City of Oak Park,* 1995 MERC Lab Op 576, to support its claim that Riske's *Weingarten* rights were not violated. In that case, a public safety officer and his union representative were called to an interview with the public safety director to discuss two overtime requests submitted by the employee. The interview had gone on for some time, and the public safety director had become increasingly angry, before the union representative first attempted to speak. The director angrily told the union representative to shut up. He also said that the representative was only there as an observer, and he told the employee that if he heeded any advice that the representative gave him he would be in grave peril. The representative remained silent until after the director had completed his questions and the employee had been dismissed. Immediately thereafter, the public safety director and the union representative went into the director's office and discussed the incident which was the subject of the interview. During this conference, the public safety director apologized for his earlier remarks and the representative was allowed to comment on the interview and make suggestions. The employee was not disciplined as a result of the interview and his overtime requests were eventually paid. The Commission held that the public safety director's statement that the union representative was there only as an observer was contradicted by his later conduct, and that the

union representative was not precluded from participating in the interview since he was allowed to speak, even though it was after the employee had left. 1

Whether or not the NLRB would have decided *Oak Park* the same way, I find that case clearly distinguishable from this one. First, I find that Franks was told at the very beginning of Riske's interview that he was to remain silent throughout the interview. The audio tape indicates that Verschaeve first told Franks that he was not to intervene on any of questions and that he was there strictly as a witness. When Franks then asked if Riske could consult with him, Smith said that Franks was there to be a witness. I find that any ambiguity in Verschaeve's first statement was erased by Smith's reiteration that Franks was there as a witness. The role of a witness is to observe; it does not include asking the interviewer questions, clarifying facts, or making suggestions. Respondent argues that neither Riske nor Franks requested an opportunity to consult during the interview. I find, however, that they had been told explicitly at the beginning of the interview that they had no right to do so. Second, in *Oak Park*¸ the union representative was given the opportunity to discuss the interview immediately after the employee was dismissed and to make any comments or suggestions he wished. Respondent asserts that Smith offered Riske and Franks the opportunity at the end of the interview to add anything to the statements Riske had made. This is not correct. Riske was asked at the end of the interview if he had anything more to add. As discussed above, Franks had earlier been told to remain silent. Neither Verschaeve nor Smith specifically asked Franks if he had anything to say. I find that, as was not the case in *Oak Park,* Riske's union representative was prevented from participating in his February 9, 2009 investigatory interview in any meaningful way. I conclude, therefore, that Respondent violated Riske's *Weingarten* rights, and Section 10(1) (a) of PERA, by instructing Franks to remain silent at this interview.

While I believe Respondent clearly violated Riske's *Weingarten* rights, the parties' stipulation of facts raises questions regarding the appropriate remedy for the violation. In *Kraft Foods, Inc,* 252 NLRB 598, 599 (1980), the NLRB established a test for determining the appropriate remedy for an employer's *Weingarten* violation when an employee is disciplined or discharged after an unlawful interview. First, the NLRB's general counsel had the burden of making a *prima facie* showing that a make whole remedy, such as reinstatement, backpay and expungement of all disciplinary records, was warranted. It could make this showing by proving that the respondent conducted an investigatory interview in violation of *Weingarten* and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview. The burden then shifted to the respondent to demonstrate that the decision to discipline the employee was not based on information which it obtained at the interview. If the employer met

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1 In *Oak Park,* the Commission quoted *Southwestern Bell Telephone Co v NLRB,* 667 F2d 470 (CA 5, 1982), in which the Court of Appeals refused to enforce the NLRB's order in the *Southwestern* case discussed above. In *Southwestern,* the union representative was told at the beginning of the interview not to say anything, that the employer wanted the employee to answer the questions in his own words. Near the end of the meeting, the union representative was asked if he had comments or clarifications. The union representative did not attempt to speak during the meeting. The Court disagreed with the NLRB's conclusion that the employer had demanded that the union representative be silent throughout the meeting. The Court noted that the employee was not told that he could not consult with the union representative during the meeting, and that the union representative had been given an opportunity to speak at the end.

this burden, the remedy was limited to a cease and desist order. Shortly thereafter, in *Illinois Bell Telephone Co,* 251 NLRB 932, 934 (1980), the Board reaffirmed that a make whole remedy was appropriate where the employer failed to show that the decision to discipline was not based on information obtained at the interview. The Board stated that it had the authority to restore the status quo ante where restoration was necessary to undo the effects of violations of the Act and where the remedy was "well designed to promote the policies of the Act."

However, in *Taracorp, Inc.*, 273 NLRB 221, 222, (1984), the Board reconsidered its holdings in *Kraft* and *Illinois Bell.* It concluded that it was prohibited from issuing make whole remedies for discipline issued as a result of an unlawful interview by Section 10(c) of the NLRA, which prohibits the Board from requiring the reinstatement or payment of backpay to an employee who has been discharged for cause. Since its *Taracorp* decision, the Board has not issued make whole remedies except where an employee is disciplined for refusing to participate in the interview after his request for union representation has been denied, See, e.g., *Barnard College,* 340 NLRB 934 (2003). In *Kent Co,* 21 MPER 61 (2008), however, the Commission explicitly refused to follow *Taracorp* and held that it found persuasive the Board's rationale for issuing make whole remedies as stated in *Illinois Bell.* The Commission affirmed the finding of the administrative law judge in *Kent Co* that the employee had been fired as a result of statements she made at an interview at which she had been denied union representation. Adopting the recommendation of the administrative law judge, it ordered the employer to reinstate the employee, although it did not order the employer to pay her backpay.

In its charge and brief, Charging Party asks for "all appropriate relief under PERA" for this violation. Neither party addressed the question of the appropriate remedy in its brief. As discussed above, the parties agreed to submit a stipulation of facts in lieu of a hearing in this case. They stipulated that "The Township used information obtained during the February 9, 2009 investigatory interview, as well as other information obtained during an internal investigation, in its decision to discharge Sergeant Riske." It is clear from this stipulation that Riske was disciplined for conduct which was the subject of the February 9, 2009 interview, and it appears that the decision was based, in part, on statements he made at the interview. However, it is not clear from the wording of the stipulation whether Riske was discharged as a "result of" statements he made at the interview. That is, it is unclear from the parties' stipulation whether Riske would have been discharged even if the interview had not taken place, based on the other information obtained during the internal investigation. It is also not clear whether there is a dispute between the parties on this point. Rather than reopening the record to conduct a hearing on an issue which may not be in dispute, I recommend that the Commission issue an order requiring Respondent to cease and desist from its illegal conduct, post a notice to employees, and reinstate Riske *if* Riske would not have been discharged but for statements he made at the February 9, 2009 interview. If, after the order is issued, the parties are unable to agree on whether statements made by Riske at this interview caused his discharge, Charging Party may request that a compliance hearing be conducted pursuant to Rule 177 of the Commission's General Rules, 2002 AACS, R 423.177.

Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Chesterfield Township, its officers and agents, are hereby ordered to:

1. Cease and desist from interfering with, restraining, or coercing employees, including, but not limited to, Earl Riske, in the exercise of rights guaranteed in Section 9 of PERA, including the right, on request, to the presence and active assistance of a union representative at an investigatory interview which the employee reasonably believes may lead to discipline.

2. If Riske would not have been terminated on March 3, 2009 but for statements he made at his February 9, 2009 interview, offer him immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to rights or privileges previously enjoyed, but without backpay.

3. Post the attached notice to employees in conspicuous places on Respondent's premises, including all locations where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____